Re Che Ku Rohaida bte Che Ku Sin; ex p Public Finance Bhd

HIGH COURT (KUALA TERENGGANU) — BANKRUPTCY NO 29–94 OF 2000
NIK HASHIM J
25 NOVEMBER 2001

Bankruptcy *— Creditor's petition — Lack of authority of person who signed petition — No particulars of name or authority furnished — Whether creditor's letter of authorization could ratify unauthorized petition — Bankruptcy Rules 1969 r 215 — Bankruptcy Act 1967 s 133(a)*

Bankruptcy *— Creditor's petition — Opposition to — Procedure — Whether service of Form 16 alone sufficient — Whether filing of affidavit in support of notice or compliance with r 18 necessary — Bankruptcy Rules 1969 rr 18 & 117*

This was an appeal against the decision of the learned deputy registrar on 14 April 2001, allowing the notice by the debtor to oppose the creditor's petition dated 16 October 2000 (encl 13A) and dismissing the creditor's petition dated 25 July 2000 (encl 6A) with costs. The two issues involved were: (i) whether the debtor, by the notice (encl 13A), complied with the prescribed mode of opposition to the creditor's petition under r 117 of the Bankruptcy Rules 1969 ('the Rules'), and (ii) whether the creditor's petition (encl 6A) was defective under r 215 and s 133(a) of the Bankruptcy Act 1967 ('the Act') for lack of authority on the person who signed the petition. With regard to the first issue, learned counsel for the judgment creditor submitted in her written submission that other than the notice of intention to oppose under r 117 of the Rules, the debtor must also file an affidavit in support or comply with r 18 of the Rules. Failure to do so by the debtor was fatal to her objections to the creditor's petition. On the second issue, learned counsel for the judgment debtor argued that the petition was defective because of lack of authority on the part of the person who signed the petition on 25 July 2000.

Held, dismissing the appeal with costs and the petition at encl 6A:

(1) The correct procedure for a debtor to oppose a creditor's petition during the hearing of the same was to file and serve only a notice in Form 16 specifying the statements in the petition which the debtor intends to oppose. For the purpose of opposing the creditor's petition under r 117, there is no need for a debtor to file an affidavit in support of the notice or to comply with r 18. A notice in Form 16 is sufficient. Rule 18 is a general provision with a proviso which means that the r 18 procedure of applications by way of summons in chambers with a supporting affidavit are not applicable where there is a specific rule applicable. The specific rule to oppose a creditor's petition is r 117 which specifically stipulates the procedure that is by filing a Form 16 notice and

nothing else. The debtor had complied with the correct mode of opposition to the creditor's petition under r 117 of the Rules. The learned deputy registrar was therefore right to allow the debtor's objections to be heard (see pp 213H–214A, G–H).

(2) The petition was defective for lack of authority on the person who signed the petition to commence the bankruptcy proceedings against the debtor. The petition failed to comply strictly with the provisions of r 215 and s 133(a) of the Act as the petition was signed by some person without any particulars of his name or authority. The failure to comply with the provisions was fatal to the petition. The authority must exist in order to present the petition. Thus, the existence of the authority is a prerequisite for the presentation of a petition. Accordingly, the creditor's letter of authorization dated 30 January 2001 could not therefore ratify the unauthorized petition. The petition was a nullity as at the date of its presentation on 25 July 2000 (see p 216B–D).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan yang arif timbalan pendaftar pada 14 April 2001, membenarkan notis penghutang untuk menentang petisyen pemiutang yang bertarikh 16 Oktober 2001 (kandungan 13A) dan menolak petisyen pemiutang yang bertarikh 25 Julai 2000 (kandungan 6A) dengan kos. Dua isu yang terbabit adalah: (i) sama ada penghutang, melalui notis (kandungan 13A), telah mematuhi cara menentang petisyen pemiutang yang diperuntukkan di bawah k 117 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah tersebut'), dan (ii) sama ada petisyen pemiutang cacat di bawah k 215 dan s 133(a) Akta Kebankrapan 1967 ('Akta tersebut') kerana orang yang menandatangani petisyen tersebut tidak mempunyai kuasa untuk berbuat demikian. Berkenaan dengan isu pertama, peguam pemiutang penghakiman yang arif berhujah di dalam penghujahan bertulis beliau bahawa selain daripada notis niat untuk menentang di bawah k 117 Kaedah-Kaedah tersebut, penghutang juga dikehendaki memfailkan afidavit sokongan atau mematuhi k 18 Kaedah-Kaedah tersebut. Kegagalan berbuat demikian oleh penghutang membawa padah kepada bantahan beliau terhadap petisyen pemiutang. Berkenaan isu kedua, peguam penghutang yang arif menyatakan bahawa petisyen tersebut cacat kerana orang yang menandatangani petisyen tersebut pada 25 Julai 2000 tidak mempunyai kuasa untuk berbuat demikian.

Diputuskan, menolak rayuan tersebut dengan kos dan petisyen di kandungan 6A:

(1) Prosedur yang betul penghutang menentang petisyen pemiutang semasa pendengaran adalah untuk memfail dan menyampaikan hanya notis di dalam Borang 16 yang menetapkan penyata-

penyata di dalam petisyen yang mana penghutang berniat menentang. Untuk menentang petisyen pemiutang di bawah k 117, penghutang tidak perlu memfailkan afidavit sokongan notis ataupun mematuhi k 18. Satu notis di dalam Borang 16 mencukupi. Kaedah 18 adalah peruntukkan am dengan proviso yang bermakna prosedur k 18 mengenai permohonan melalui saman dalam kamar dengan afidavit sokongan tidak dapat digunakan sekiranya terdapat kaedah khusus. Kaedah khusus untuk menentang petisyen pemiutang adalah k 117 yang secara khusus menyatakan prosedur iaitu dengan memfailkan hanya notis Borang 16. Penghutang telah mematuhi cara yang betul untuk menentang petisyen pemiutang di bawah k 117 Kaedah-Kaedah tersebut. Timbalan pendaftar yang arif adalah betul dalam membenarkan bantahan-bantahan penghutang didengar (lihat ms 213H–214A, G–H).

(2) Petisyen tersebut cacat kerana orang yang menandatangani petisyen tersebut tidak mempunyai kuasa berbuat demikian untuk memulakan prosiding kebankrapan terhadap penghutang. Petisyen tersebut gagal mematuhi peruntukan-peruntukan k 215 dan s 133(a) Akta tersebut kerana petisyen tersebut ditandatangani oleh seorang yang tidak menyatakan namanya ataupun kuasanya. Kegagalan ini membawa padah kepada petisyen tersebut. Kuasa tersebut mesti ada untuk mengemukakan petisyen tersebut. Oleh itu, kewujudan kuasa merupakan prasyarat untuk mengemukan petisyen tersebut. Surat kuasa pemiutang yang bertarikh 30 Januari 2001 tidak dapat meratifikasikan petisyen yang tidak diberi kuasa. Petisyen tersebut merupakan pembatalan semenjak hari pengemukaannya pada 25 Julai 2000 (lihat ms 216B–D).]

Notes

For cases on creditor's petition, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1626–1635.

Cases referred to

Chen Sing Chew, Re; ex p Oriental Tin Smelters Sdn Bhd [1974] 2 MLJ 69 (refd)

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (refd)

Development & Commercial Bank Bhd v Datuk Ong Kian Seng [1995] 2 MLJ 724 (refd)

Hong Kim Sime v Malayan Banking Bhd [1999] 4 MLJ 257 (refd)

J Raju all M Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177 (refd)

Lim Hong Kee David, Re [1995] 4 MLJ 564 (refd)

Mohd Tajuddin Mohd Jali, Re; ex p Perwira Habib Bank (M) Bhd [2000] 5 MLJ 458 (refd)

Samuel Pakianathan a/l Jabamanikam, Re; ex p Perwira Habib Bank (M) Bhd [1997] 5 MLJ 737 (refd)
Sobri bin Arshad v Associated Tractors Sdn Bhd [1991] 3 MLJ 32 (refd)

Legislation referred to

Bankruptcy Rules 1969 rr 16, 18, 117, 215, Form 16
Bankruptcy Act 1967 s 133(a)
Contracts Act 1950 s 149

Rita Phuah (*Wong Yoke Ping* with her) (*Lai Yoong & Rita*) for the judgment creditor.
Jacob Goldie (*Jacob Goldie & Toh*) for the judgment debtor.

Nik Hashim J:

Background

This is an appeal against the decision of the learned deputy registrar, who on 14 April 2001, allowed the notice by debtor to oppose the creditor's petition dated 16 October 2000 (encl 13A) and dismissed the creditor's petition dated 25 July 2000 (encl 6A) with costs.

Issues

Essentially, there are two issues for determination in this appeal:

(1) Whether the debtor by the notice (encl 13A) complied with the prescribed mode of opposition to the creditor's petition under r 117 of the Bankruptcy Rules 1969 ('the Rules').

(2) Whether the creditor's petition (encl 6A) was defective under r 215 of the Rules and s 133(a) of the Bankruptcy Act 1967 ('the Act') for lack of authority on the person who signed the petition.

Contentions of the parties

With regard to the first issue, learned counsel for the judgment creditor submitted in her written submission that other than the notice of intention to oppose under r 117 of the Rules, the debtor must also file an affidavit in support or comply with r 18 of the Rules. Failure to do so by the debtor is fatal to her objections to the creditor's petition. Learned counsel cited *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 and *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724 and *Re Lim Hong Kee David* [1995] 4 MLJ 564 in support.

On the second issue, learned counsel for the judgment debtor argued forcefully that the petition was defective because of lack of authority on the part of the person who signed the petition on 25 July 2000, and in support of his argument, learned counsel quoted *Re Chen Sing Chew; ex p Oriental Tin Smelters Sdn Bhd* [1974] 2 MLJ 69.

Findings of the court

Issue No (1)

In the light of the foregoing submissions, it is therefore necessary to reproduce the provisions of rr 18 and 117 of the Rules. They are:

> 18 Applications to be made by summons in chambers
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> (1) Except where these Rules or the Act otherwise provide, every application to the court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.
>
> (2) Notwithstanding sub-r (1), where applicable, all applications filed by way of motion before the commencement of these Rules may be heard by the Registrar as if they were applications made under such Rules.
>
> 117 Debtor intending to show cause
>
> Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

The provision under r 117 has been considered in many cases. In the recent case of *Ĵ Raju all M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177, the Court of Appeal, after having considered all relevant authorities including the Supreme Court case of *Datuk Lim Kheng Kim* and the Federal Court case of *Development & Commercial Bank Bhd*, on the various methods of opposing or setting aside the various stages in bankruptcy proceedings, came to the following judgment:

> In our judgment, the following propositions may be distilled from a rationalization of the authorities we have thus far discussed.
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> (1) When determining an issue under the Act, it is incumbent upon the court to accord its provisions a strict construction.
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> (2) ...
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> (3) ...
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> (4) ...
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> (5) ...
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> (6) ...
>
> (7) A debtor who opposes a creditor's petition must comply with the procedure prescribed by r 117 of the Rules. If he does not do so, any challenge he may mount is liable to fail for non-compliance of the Rules.

Thus, by reason of the said judgment and the very clear provision of r 117, the correct procedure for a debtor to oppose a creditor's petition during the hearing of the same is to file and serve only a notice in form 16 specifying the statements in the petition which the debtor intends to oppose. In my view, for the purpose of opposing the creditor's petition under r 117, there is no need for a debtor to file an affidavit in support of the notice or to comply with r 18. A notice in form 16 is sufficient.

Rule 18 is a general provision with a proviso which means that the r 18 procedure of applications by way of summons in chambers with a supporting affidavit are not applicable where there is a specific rule applicable. The specific rule to oppose a creditor's petition is r 117 which specifically stipulates the procedure, that is by filing a form 16 notice and nothing else.

Example of cases which make no reference to the requirement for the filing of a summons in chambers supported by an affidavit pursuant to r 18 are as follows:

(1) The Federal Court decision of *Hong Kim Sime v Malayan Banking Bhd* [1999] 4 MLJ 257, at p 259 para C:

> By a notice dated 24 June 1994 taken out under r 117 of the Bankruptcy Rules 1969, the judgment debtor objected to the validity of the bankruptcy petition contending that the verifying affidavit in support, being attested by a justice of the peace in Sabah, was defective.

(2) The Court of Appeal decision of *J Raju all Kerpaya.*

(3) The High Court decision of *Re Mohd Tajuddin Mohd Jali; ex p Perwira Habib Bank (M) Bhd* [2000] 5 MLJ 458, at p 464 para F:

> In the instant case, the judgment debtor has filed the notice of intention to oppose the creditor's petition pursuant to r 117 of the Bankruptcy Rules 1969. In the circumstances, in my view the judgment debtor has a right to be heard: *Re Ngan Chin Wen; ex p Moscow Narodny Bank Leo.*

The above cases clearly illustrate that a judgment debtor has a right to be heard when he files a notice pursuant to r 117.

The three cases of *Datuk Lim Kheng Kim, Development & Commercial Bank Bhd* and *Re Lim Hong Kee David* cited by the creditor's counsel are distinguishable from the present case. They were decided based on the grounds that the judgment debtor failed to file a notice in form 16 pursuant to r 117, but instead merely filed an affidavit in opposition. Moreover, their affidavits in opposition raised matters outside the creditor's petition and therefore, the courts ruled that they should have applied under the general provision of the r 18 by way of summons in chambers along with a supporting affidavit to make such a challenge.

In the instant case, however, the debtor was not raising anything outside the creditor's petition. The debtor strictly confined her objections to the petition as provided in r 117. In the circumstances, I hold that the debtor has complied with the correct mode of opposition to the creditor's petition under r 117 of the Rules. The learned deputy registrar was therefore right to allow the debtor's objections to be heard.

Issue No (2)

The petitioner creditor in its petition (encl 6A) commenced the action by stating 'Kami (we), PUBLIC FINANCE BHD' and in the premises, Public Finance Bhd must sign the petition. The petition contains an illegible signature of someone without designation. The petition was presented on 25 July 2000.

A It was deposed in the affidavit affirmed on 21 July 2000 and verifying the creditor's petition (encl 6B) that the deponent, Tan Teng Hoong, was duly authorized by the creditor to affirm the said affidavit and to present the creditor's petition on its behalf.

As a result of the opposition by the debtor's notice (encl 13A) disclosing
B the defects in the petition, the deponent thereafter admitted in his affidavit affirmed on 7 February 2001 (encl 14A) that he signed the petition, and that the creditor had vide the letter of authorization dated 30 January 2001 (exh 'TTH 1') duly authorized the deponent under the seal of the creditor to act on its behalf and also ratified any and all actions taken by the deponent earlier in the bankruptcy proceedings against the debtor.

C In defending the validity of the petition, learned counsel for the creditor submitted that the authority, although given after the date of the petition, is valid by reason of the creditor ratifying the act of its agent by virtue of s 149 of the Contracts Act 1950 ('the CA').

With respect, I do not agree with her. In my view, the law of contract of
D ratification of acts done by an agent on behalf of another under s 149 of the CA has no application to bankruptcy proceedings in respect of r 215 of the Rules and s 133(a) of the Act.

Section 133(a) of the Act states:

> (a) a corporation may act by any of its officers authorized in that behalf under
E the seal of the corporation.

Whereas r 215 of the Rules provides:

> Where a corporation presents a petition or takes any other action under this Act, this officer of the corporation may act in his own name, stating that he is
F such officer duly authorized under seal; but a petition may be presented by the corporation, and signed by the officer on its behalf. Any person chosen by the corporation to act for it as agent, is an 'officer' within s 133, and if duly authorized under seal can act for the corporation.

Thus, by their provisions, it implies that the authority must be in existence when the petition is presented, and such authority cannot therefore be
G ratified retrospectively, though such authority may be granted for the future presentation of a petition in respect of acts of bankruptcy which may not have arisen at the date when the authority was given (see *Re Samuel Pakianathan a/l Jabamanikam; ex p Perwira Habib Bank (M) Bhd* [1997] 5 MLJ 737).

H However, in the case under discussion, there was only an illegible signature of someone without a designation. Learned counsel for the debtor rightly pointed out that there is nothing in the petition to show that the petition has been signed by the petitioner creditor or the authority of some other person duly authorized to sign the petition on behalf of the petitioner creditor as required by r 215 and s 133(a) of the Act on 25 July 2000 when
I the petition was presented. Further, the attestation by the solicitor in the petition fails to state who signed the petition and in what capacity was it signed.

The material aspect of the instant case is somewhat identical to the facts in *Re Chen Sing Chew*. There, the judgment debtor raised objections to the creditor's petition, inter alia, on the grounds that there was lack of authority on the person who signed the petition. The bankruptcy petition was dated 27 October 1972, whereas the authority to the officer, one N Takai, was given after the date of the petition, ie on 23 October 1973. Wan Hamzah J (as he then was) upheld the debtor's objection and dismissed the petition, inter alia, on the grounds of lack of authority to commence the bankruptcy proceedings against the debtor.

With great respect, I am in full agreement with the learned judge's ruling. Similarly, in the present case, the petition is defective for lack of authority on the person who signed the petition to commence the bankruptcy proceedings against the debtor. The petition fails to comply strictly with the provisions of r 215 and s 133(a) of the Act as the petition was signed by some person without any particulars of his name or authority. The failure to comply with the provisions is fatal to the petition. The authority must exist in order to present the petition. Thus, the existence of the authority is a prerequisite for the presentation of a petition. Accordingly, the creditor's letter of authorization dated 30 January 2001 cannot therefore ratify the unauthorized petition. The petition was a nullity as at the date of its presentation on 25 July 2000.

In determining the two issues, the court accorded the provisions in the Rules and the Act a strict construction in a manner most favourable to the debtor. Edgar Joseph Jr J, (as he then was) in *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32, at p 34 aptly said:

> On a concluding note, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequences, meticulous compliance with the law is often necessary. The case of *In re North, ex p Hasluck* [1895] 2 QB 264 is authority for the proposition that the statute relating to bankruptcy should be construed in a manner most favourable to the person affected.

Thus, by reasons of the aforesaid matters, I hereby dismiss the appeal with costs, and the petition at encl 6A is dismissed.

Appeal dismissed with costs and petition at encl 6A dismissed with costs.

Reported by Chew Phye Aun